

JUL 29 1987

No. 87-7

JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

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FREDRIC E. and ADRIAN MICHELS;
ROBERT and TERESA KLEIN;
RICHARD and PAMELA RECEVEUR; and
McKINLEY and WILMA THURMAN,

Petitioners

v.

TIMES MIRROR CABLE TELEVISION OF
LOUISVILLE, INC.;
STORER COMMUNICATIONS OF JEFFERSON
COUNTY, INC.;
LOUISVILLE GAS & ELECTRIC COMPANY; and
SOUTH CENTRAL BELL TELEPHONE COMPANY,

Respondents.

—o—
**ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY**

—o—
RESPONDENT'S BRIEF IN OPPOSITION

—o—
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COUNTERSTATEMENT OF CASE

This brief is submitted by Times Mirror Cable Television of Louisville, Inc. ("Times Mirror"),¹ by counsel.

This is a case of an alleged trespass in which the Jefferson Circuit Court of the Commonwealth of Kentucky granted summary judgment to Times Mirror on the grounds that the Petitioners asserting claims against Times Mirror, Fredric E. and Adrian Michels and Robert and Teresa Klein (individually, the "Michels" or "Kleins" and collectively the "Petitioners"), consented to the presence of Times Mirrors cable television coaxial cable on Petitioners' residential properties. The Court of Appeals of Kentucky affirmed upon the basis that the Petitioners' easements, through which the coaxial cable of Times Mirror was installed on utility poles, were, by their terms, apportionable or expressly authorized the presence of the cable. The Supreme Court of Kentucky affirmed the decision of the Court of Appeals upon the same grounds as those upon which the Jefferson Circuit Court granted summary judgment, that is, consent.

The deed to the Kleins' residential property in Louisville, Kentucky, provides that it is subject to all easements of record. These easements include "a five foot easement . . . retained across the rear [of the lot] for public utility purposes". (R. 2164-65.) The Kleins subscribed to the cable television services of Times Mirror almost immediately after they moved into their home in 1983. At that time, they signed an agreement with Times Mirror which provided that:

¹In compliance with Rule 28.1 (Statement of Subsidiaries and Affiliates) Times Mirror states that its parent corporation is Times Mirror Cable Television, Inc. and that it has no affiliates or subsidiaries.

Customer hereby grants to Company the right to enter upon and over the premises at reasonable times at the above address at any time during this agreement to install, connect, disconnect, inspect or alter the service facilities.

(R. 2168-69.)

The deed to the Michels' residential property in Louisville, Kentucky, also provides that it was subject to all easements of record. (R. 2153-54.) One of these easements provided as follows:

The spaces outlined by dotted lines and marked 'Electric and Telephone Easement' or 'Street Lighting Easement' are hereby reserved as easements for electric and telephone utility purposes including the right of ingress and egress over all lots to and from the easements and the right to cut down or trim trees within or without the easements that may interfere with the installation or operation of the lines. The easements shall be kept free of all obstructions including permanent fences, trees, shrubbery and gardens.

The Michels also subscribed to the cable television services of Times Mirror and executed an agreement providing that:

Applicant hereby agrees to abide by the regulations of the Company as listed below:

1. Permit authorized personnel of Company free access to the premises for the installation and service of the cable drop wire, converter, home terminal unit, and other equipment

SUMMARY OF ARGUMENT

This case presents no issue of federal law. It is a trespass action and the judgment of the Supreme Court of Kentucky is based upon an independent and adequate state law ground, that is, Petitioners consented to the presence of Time Mirror's coaxial cable. The judgment of the Supreme Court of Kentucky is also supportable on other state law grounds. These are that the Petitioners' easements were apportionable, or expressly authorized the presence of Times Mirror's coaxial cable.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE JUDGMENT OF THE SUPREME COURT OF KENTUCKY IS BASED UPON INDEPENDENT AND ADEQUATE STATE GROUNDS

That this Court lacks the power to review state court judgements except to the extent that they incorrectly adjudge federal rights has been characterized as "so obvious that it has rarely been thought to warrant statement." *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945). Specifically, this proposition and its rationale have been stated as follows:

[The rationale] is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.

As one commentator has noted "The independent and adequate state ground rule is thus a corollary of the fundamental principle that the [Supreme] Court lacks jurisdiction to review matters of state law." Stern & Gressman, *Supreme Court Practice* (6th ed), Section 3.25.

That the Petitioners seek to have this Court review matters of state law is illustrated by the three Questions Presented for review:

- I. Did the Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the Statute of Limitations?
- II. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?
- III. Is CATV a utility?

The answers to these Questions by the Supreme Court of Kentucky and one of its Justices in a concurring opinion further illustrate that each presents issues exclusively within the domain of state law. In response to the first Question, the Supreme Court of Kentucky, citing to Kentucky cases or the Restatement of Torts, held that:

We think it is clear that the [Petitioners] had no objection to the installation of the cable television equipment when it was installed upon the utility poles within the confines of the easement. They signed an agreement permitting the employees of the cable companies access to their property for the installation and maintenance of the cable equipment, and they further agreed that the cable companies might install an aerial drop line across their property outside the confines of the easement to connect the coaxial cable to their residences.

In response to the second Question Presented, the Supreme Court stated that "We decline to review the question of the apportionability of the easement involved in this case." However, one of the Justices of the Supreme Court of Kentucky did address this issue in his concurrence to the majority opinion and he stated as follows:

In each of the cases presently involved, the existing public utility easement was sufficient to permit apportionment to accommodate new technology. The apportioned use of the easements by the CATV companies places upon the appellants as owners of the servient estates no additional burdens which should be considered beyond the contemplation of the easement in question.

The majority opinion of the Supreme Court of Kentucky also did not address the third Question Presented by the Petitioners to this Court. However, one of the Justices of that court did address this third Question in his concurrence. He stated that:

However, I agree with the Court of Appeals that CATV is in fact a public utility within the contemplation of the easement in question, and that the CATV industry is not deprived of its status simply because utility regulatory agencies of the federal and state governments have declined to regulate it.

Obviously, the Questions Presented by the Petitioners are questions of state law. The first Question concerns a simple issue of whether there was a consent to an alleged trespass. The second concerns whether Petitioners' easements were apportionable to Times Mirror and the third concerns whether Times Mirror is a utility within the meaning of one of the Petitioners' easements. None of these is an issue of federal law, arises under any provision of the Constitution of the United States or presents any issue of the construction of a federal statute.

Apparently, Petitioners believe that their Petition presents a constitutional issue because they have allegedly been denied some constitutional right. However, constitutional rights may only be denied through state action. *See, Lloyd*

v. Tanner, 407 U.S. 551 (1972). As a private corporation, Times Mirror cannot deny Petitioners any constitutional right.

Finally, Petitioners contend that somehow the judgment of the Supreme Court of Kentucky is inconsistent with the decision of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.* 458 U.S. 419 (1982). This contention is meritless. In that case, this Court invalidated a state statute requiring landlords not to interfere with, or charge a fee for installation of cable television facilities upon their rental property. The state law issues of construction of easements and whether there had been consent to an alleged trespass were not at issue in that case, as they are here.

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CONCLUSION

For the reasons stated above, the Writ should be denied.

Respectfully submitted,

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